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No. 82-662

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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MARIE FALCO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for making a false material statement in violation of 18 U.S.C. (& Supp. V) 1623.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-882

MARIE FALCO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 10, 1982. A petition for rehearing was denied on September 27, 1982 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on November 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTE INVOLVED

18 U.S.C. (& Supp. V) 1623(a) provides in pertinent part:

> Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration

or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT

1. Petitioner was indicted on one count of conspiring to commit perjury, in violation of 18 U.S.C. 371 (Count 1); two counts of committing perjury at a criminal trial, in violation of 18 U.S.C. 1623 (Counts 2 and 3); and one count of using a false document in the course of her testimony at a criminal trial in violation of 18 U.S.C. 1623 (Count 4). Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on Counts 2 and 4 and acquitted on Counts 1 and 3. She was sentenced to concurrent terms of 18 months' imprisonment, with all but three months suspended, to be followed by three years' probation. She was also ordered to devote 300 hours to community service during each of the first two years of her probationary term.

2. The evidence showed (Pet. App. 1a-4a) that petitioner was the secretary to Patrick Cunningham, a New York State political leader. During 1978, the Internal Revenue Service was investigating the sources of certain income Cunningham had reported. In order to support his tax reports, Cunningham persuaded a friend, John Spain, to tell the IRS investigators that in 1975 he had paid Cunningham $2,000 in cash for legal services. Spain made such statements to IRS investigators on two occasions during 1978. In July 1980, Spain testified before a grand jury investigating Cunningham for possible violations of tax laws. In the course of his grand jury testimony, Spain denied that he had made cash payments to Cunningham and further denied that he had told the IRS investigators

that he had made such payments. Spain was subsequently indicted for making false statements to the grand jury about what he had told the IRS investigators.

Spain's principal defense to the perjury charges was that by the time he testified before the grand jury he had forgotten what he had told the IRS investigators and thus did not knowingly give false testimony. At his trial, Spain called petitioner to testify concerning a memorandum dated January 25, 1978, which purportedly described Spain's interview with the IRS investigators on that date. The memorandum stated that Spain had told the IRS investigators that he had never paid Cunningham any cash. Petitioner testified that she had typed the memorandum immediately after receiving a telephone call from Spain concerning his interview with the IRS investigators. On cross-examination she insisted that she had typed the memorandum herself, in spite of the fact that the memorandum contained numerous typographical errors and in the face of evidence showing that she had not worked late on the night in question. On the basis of petitioner's testimony, the memorandum was received in evidence at Spain's trial. Nevertheless, Spain was convicted.

Based on her testimony concerning the memorandum, petitioner was indicted in the instant case for making false material declarations under oath and using a false document in a proceeding before a court of the United States, in violation of 18 U.S.C. 1623. At her trial petitioner admitted that the memorandum she had authenticated at Spain's trial was false, but she claimed that her mental and emotional condition at the Spain trial had rendered her unable to distinguish between the false memorandum and one she had actually prepared. The trial court denied petitioner's request to present evidence concerning the materiality of her prior testimony and to argue the question of materiality to the jury.

3. The court of appeals affirmed (Pet. App. 1a-8a). It rejected petitioner's argument that the trial court erred in refusing to submit the issue of materiality to the jury. The court of appeals noted that it had consistently held that materiality is a threshold question to be decided by the court and that, in any event, petitioner's false statements were "unquestionably relevant to whether Spain testified falsely to the Grand Jury" (*id.* at 5a).[1]

## ARGUMENT

Petitioner contends that the trial court erred in not submitting to the jury the question of the materiality of her false statements to the issue at Spain's trial of whether Spain testified falsely before the grand jury. She acknowledges (Pet. 21) that this Court has stated that the materiality of false testimony charged as perjury is a question of law to be decided by the court rather than the jury. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929). Petitioner contends, however, that the rule articulated in *Sinclair* is no longer viable; in particular, she argues (Pet. 20-36) that the materiality of a false statement alleged to constitute a violation of 18 U.S.C. (& Supp. V) 1623[2] is an essential element of the crime and that a jury therefore must find materiality beyond a reasonable doubt. Petitioner's contentions are without merit and do not warrant further review.

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[1]The court of appeals concluded also (Pet. App. 4a-8a) that the evidence was sufficient to support petitioner's conviction, that petitioner's motion for a new trial on the basis of newly discovered evidence was properly denied, that the jury instructions were adequate, that the trial court did not err in admitting certain evidence, and that the trial court did not rely on material misinformation or constitutionally impermissible factors in setting petitioner's sentence. Those holdings are not at issue here.

[2]Although petitioner refers to a variety of statutes, only 18 U.S.C. (& Supp. V) 1623 is at issue in her case.

1. *Sinclair* involved a challenge to a conviction under 2 U.S.C. 192, which imposes a penalty on any witness before a committee of Congress who refuses to answer "any question pertinent to the question under inquiry" by the committee. The Court rejected Sinclair's claim that the question he had refused to answer was not pertinent to any inquiry the committee was authorized to make. 279 U.S. at 296-298. The Court went on to hold that the question of pertinency had been "rightly decided by the court as one of law." *Id.* at 298. The Court observed that the question of pertinency was "not essentially different from the question as to materiality of false testimony charged as perjury in prosecution for that crime. * * * [T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Ibid.* (citations omitted). The Court also noted that questions of pertinency were similar to those concerning relevancy of evidence, which were clearly matters of law to be decided by the court. The Court concluded that the reasons for holding relevancy and materiality to be questions of law applied with equal force to the determination of pertinency and that it would be "incongruous and contrary to well-established principles to leave the determination of such a matter to a jury." *Id.* at 299 (citations omitted).

In concluding that materiality in the context of a perjury prosecution is a matter of law to be decided by the court rather than the jury, the Court in *Sinclair* articulated a principle of long standing in both federal and state courts. See, *e.g.*, Annot., 62 A.L.R. 2d 1027 (1958) (citing numerous federal and state cases); Annot., 22 A.L.R. Fed. 379, 387-389 (1975) (citing cases brought under 18 U.S.C. 1621 and 1622). Contrary to petitioner's suggestion, that rule continues to be a viable one. This Court has not retreated from its statements in *Sinclair*. In *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962), the Court cited as a basic

proposition its holding in *Sinclair* that pertinency under 2 U.S.C. 192 is a question to be determined by the court as a matter of law. The traditional rule with respect to materiality in a perjury prosecution continues to be followed in the federal courts and in the majority of state courts. See, *e.g.*, *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980) (describing rule as "well settled" in a case brought under 18 U.S.C. (& Supp. V) 1623); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979) (characterizing rule as "long settled" in a case brought under 18 U.S.C. (& Supp. V) 1623). As this Court noted in *Sinclair*, that rule is justified in view of the similarity between the issues of materiality in a perjury prosecution and relevancy of evidence for purposes of admissibility in any legal proceeding, a matter that is decided by the court under our legal system.[3] The legislative history of 18 U.S.C. (& Supp. V) 1623 does not indicate that Congress intended to abandon the traditional rule in prosecutions under that statute. See *United States* v. *Watson, supra*, 623 F.2d at 1201 n.6. Petitioner herself does not present "logical arguments" against the rule articulated in *Sinclair* and numerous other cases, but states only that such arguments "must await a full appellate brief" (Pet. 21).

Petitioner contends that various constitutional cases decided by this Court require abandonment of the traditional rule that materiality is a question of law to be decided by the court in perjury cases. But the cases she cites do not dictate such a result. Both *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and *Baldwin* v. *New York*, 399 U.S. 66 (1970), hold

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[3]Materiality may be a question of fact in some types of proceedings, such as prosecutions under certain fraud statutes. See pages 7-8 note 5, *infra*. However, in the context of a perjury prosecution, in which the question is the materiality of a false statement or document to an issue in a legal proceeding, materiality normally is a matter of law.

that a defendant is entitled to a jury trial in certain types of cases involving exposure to a substantial term of imprisonment. Neither decision suggests that a jury should decide questions of law as well as questions of fact. Here petitioner had a jury trial in which the jury decided all controverted factual issues. Thus, there was no violation of the principles stated in *Bloom* and *Baldwin*. Petitioner also cites *In re Winship*, 397 U.S. 358 (1970), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), in which the Court made clear that the prosecution is required to prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged (397 U.S. at 364). As the language of *Winship* suggests, the "beyond a reasonable doubt" standard applies to questions of fact; it simply does not apply to, or even have any real meaning in connection with, questions of law.[4]

2. Petitioner contends (Pet. 7-12) that there is a conflict among the circuits with respect to whether materiality is a question of law to be decided by the court. The cases that petitioner cites do not necessarily indicate a conflict;[5] in any

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[4]Petitioner also cites the statement of the Court in *Jackson* v. *Virginia*, 443 U.S. 307, 316 (1979), that there must be "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." That statement is simply a description of the holding in *Winship*, which on its face relates to issues of fact, rather than issues of law. See also *Patterson* v. *New York*, 432 U.S. 197, 210 (1977) (characterizing prior decisions).

[5]The cases petitioner cites as rejecting the *Sinclair* rule involve statutes other than 18 U.S.C. (& Supp. V) 1623 and in some instances do not address directly the question whether materiality is a matter of law. See, *e.g.*, *United States* v. *Halbert*, 640 F.2d 1000, 1007-1008 (9th Cir. 1981) (concluding that the failure to instruct the jury on materiality in a mail fraud prosecution under 18 U.S.C. 1341 and 1342 was harmless error, since the materiality of the misrepresentations was clearly established by the evidence); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) (concluding that materiality should have been submitted to the jury in a prosecution under 18 U.S.C. 1001, but that failure to do so was not reversible error because the materiality of the false statements

event, it is clear that no conflict exists with respect to the determination of materiality under 18 U.S.C. (& Supp. V) 1623, the statute petitioner was charged with violating. Although petitioner cites the Eighth and Ninth Circuits as having rejected the traditional rule (Pet. 8), both circuits have held that in cases brought under 18 U.S.C. (& Supp. V) 1623 materiality is a question of law to be decided by the court. See *United States* v. *Ostertag*, 671 F.2d 262, 265 (8th Cir. 1982); *United States* v. *Kekich*, 590 F.2d 750, 752 n.3 (8th Cir. 1979); *United States* v. *Dipp*, 581 F.2d 1323, 1328 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *United States* v. *Percell*, 526 F.2d 189, 190 (9th Cir. 1975). These decisions accord with the decisions of the First, Second, Fourth, Fifth, Sixth and Seventh Circuits, cited by

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at issue was so clearly established); *United States* v. *Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978) (failure to instruct jury on materiality in mail fraud prosecution was not error because materiality was clearly established from the evidence); *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (concluding that the jury had been properly instructed on the issue of materiality in a prosecution under 18 U.S.C. 1001); *Johnson* v. *United States*, 410 F.2d 38, 46 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (stating that questions of materiality are for the trial court in a prosecution under 18 U.S.C. 287, but indicating that the issue of materiality in fact had been submitted to the jury). None of these cases refers to *Sinclair*.

The statutes at issue in these cases, as well as those in the civil cases petitioner cites (Pet. 22), address fraud as well as perjury. The question of materiality in a fraud-type case is often the factual tendency of the alleged action or statement to induce action by the government or by an investor, which is different from the legal question of materiality of testimony in a legal proceeding. See *United States* v. *Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980).

petitioner (Pet. 9-10). Thus, there is no conflict that requires the attention of this Court.[6]

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[6]Petitioner also contends (Pet. 13-15) that conflict exists among cases within the Eighth Circuit and among district courts within the Second Circuit. Assuming such conflicts exist, they are not matters that call for the attention of this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Petitioner argues that the Court should resolve a conflict between state and federal courts concerning whether materiality is a matter of law. She cites *Commonwealth* v. *McDuffee*, 379 Mass. 353, 398 N.E. 2d 463 (1979), in which the Supreme Judicial Court of Massachusetts held that the element of materiality under a state perjury statute was a matter for the jury rather than for the court. See also *People* v. *Clemente*, 285 A.D. 258, 262, 136 N.Y.S.2d 202, 206 (1954), aff'd, 309 N.Y. 890, 131 N.E. 2d 294 (1955) (construing New York perjury statute as requiring submission of materiality to jury). Of course, *McDuffee* did not address materiality under 18 U.S.C. (& Supp. V) 1623. In addition, *McDuffee* involved a false statement made to a government agency in a license renewal proceeding, not perjury committed during a trial or grand jury proceeding. Thus, it may be closer to a fraud-type case. See note 5, *supra*. *McDuffee* represents a minority view among the states. See *State* v. *Gallegos*, 98 N.M. 31, 644 P.2d 545, 546 (Ct.App. 1982) (noting that all federal courts follow the traditional rule and that New York and Massachusetts are the only states that hold that materiality is a jury question in a perjury case). Because the issue is essentially statutory, and state courts do not try prosecutions brought under 18 U.S.C. (& Supp. V) 1623, there can be no conflict requiring resolution by this Court.

Even if petitioner were correct in her contention that it would be advisable to reconsider the well established rule that materiality is a question of law to be decided by the court in the context of a perjury prosecution, this case would not be an appropriate vehicle for such reconsideration, since submission of materiality to the jury could not conceivably have affected the outcome of her trial. As the court of appeals stated (Pet. App. 5a), petitioner's false statements concerning the memorandum she allegedly had typed "were unquestionably relevant to whether Spain testified falsely to the Grand Jury." Nor is there any factual dispute concerning the content of petitioner's testimony at Spain's trial or the issues at that trial.

Petitioner does not argue the merits of her contention that her testimony was not material (Pet. 3 n.*), on the ground that "the factual explanation necessary to those arguments is exceedingly complex

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

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• • •." In view of the obvious materiality of petitioner's trial testimony to the truthfulness of Spain's grand jury testimony, it is difficult to imagine what factual explanation, simple or complex, could possibly refute the court's conclusion.